

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TRINIA M. CONRAD,	)	
	)	No. CV-04-5116-CI
Plaintiff,	)	
	)	ORDER GRANTING IN PART
v.	)	PLAINTIFF'S MOTION FOR SUMMARY
	)	JUDGMENT AND REMANDING FOR
JO ANNE B. BARNHART,	)	ADDITIONAL PROCEEDINGS
Commissioner of Social	)	PURSUANT TO 42 U.S.C. § 405(G)
Security,	)	
	)	
Defendant.	)	
	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 17, 21) submitted for disposition without oral argument on August 15, 2005. Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Jeffrey H. Baird represents Defendant. The parties consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and **REMANDS** for additional proceedings pursuant to 42 U.S.C. § 405(g).

Plaintiff, who was 37-years-old at the time of the administrative decision, protectively filed a second<sup>1</sup> application for

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<sup>1</sup>Plaintiff initially filed an application for SSI benefits on January 7, 1997. (Tr. at 53-56.) The application was denied

1 Supplemental Security Income (SSI) benefits on August 21, 2001,  
2 alleging onset as of February 1, 2001, due to prolapsed slipped disc  
3 in her back causing constant numbness in the right leg with constant  
4 pain, as well as other physical and mental impairments. (Tr. at  
5 21.) Plaintiff attended school for 13 years and had past employment  
6 as a cashier / checker. Following a denial of benefits and  
7 reconsideration, a hearing was held before ALJ Mary B. Reed (ALJ).  
8 The ALJ denied benefits after concluding Plaintiff was able to  
9 perform her past relevant work. Review was denied by the Appeals  
10 Council. This appeal followed. Jurisdiction is appropriate pursuant  
11 to 42 U.S.C. § 405(g).

12 **ADMINISTRATIVE DECISION**

13 ALJ Reed found Plaintiff previously had applied for SSI  
14 benefits which were denied on May 28, 1998, after findings were made  
15 by ALJ Jensen that Plaintiff was able to perform sedentary work with  
16 some additional limitations. (Tr. at 21.) ALJ Reed, in the instant  
17 action, found there was no basis on which to reopen that claim and  
18 that finding has not been challenged by Plaintiff. (Tr. at 20.)  
19 Thus, the relevant time period at issue is from August 21, 2001, the  
20 date of the current SSI application to February 9, 2004, the date of  
21 ALJ Reed's decision.

22 The ALJ concluded Plaintiff had not engaged in substantial  
23 gainful activity and suffered from severe impairments including  
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26 \_\_\_\_\_  
27 initially, on reconsideration, and, following an administrative  
28 hearing, that rejection was affirmed on May 28, 1998. (Tr. at 442.)

1 status post foot surgeries, degenerative disc disease, obesity<sup>2</sup>, and  
2 drug seeking behavior. (Tr. at 27.) Those impairments were not  
3 found to meet the Listings. The ALJ concluded Plaintiff's testimony  
4 was not fully credible and that she retained the residual capacity  
5 to perform past relevant work as a checker / cashier. (Tr. at 32.)  
6 Thus, the ALJ concluded Plaintiff was not disabled.

### 7 ISSUES

8 The question presented is whether there was substantial  
9 evidence to support the ALJ's decision denying benefits and, if so,  
10 whether that decision was based on proper legal standards. Plaintiff  
11 asserts the ALJ erred when she failed to (1) consider the combined  
12 effects of Plaintiff's physical and mental impairments and (2)  
13 properly conduct a step four analysis.<sup>3</sup>

### 14 STANDARD OF REVIEW

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
16 court set out the standard of review:

17 The decision of the Commissioner may be reversed only if  
18 it is not supported by substantial evidence or if it is  
based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,

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19 <sup>2</sup>Plaintiff was 5' tall and weighed 194 pounds in April 2003.

20 <sup>3</sup>In her Reply brief, Plaintiff raises the additional issue of  
21 failure to properly reject the opinions and diagnoses of treating  
22 physicians as to severe abdominal pain. (Ct. Rec. 23-1 at 2.)  
23 Because this claim was not raised in her opening brief and because  
24 it appears the references to abdominal pain pre-date the current  
25 application, the argument will not be considered. *Cedano-Viera v.*  
26 *Ashcroft*, 324 F.3d 1062, 1066 n. 5 (9th Cir. 2003) ("[W]e decline to  
27 consider new issues raised for the first time in a reply brief.").

1 1097 (9th Cir. 1999). Substantial evidence is defined as  
 2 being more than a mere scintilla, but less than a  
 3 preponderance. *Id.* at 1098. Put another way, substantial  
 4 evidence is such relevant evidence as a reasonable mind  
 5 might accept as adequate to support a conclusion.  
 6 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
 evidence is susceptible to more than one rational  
 interpretation, the court may not substitute its judgment  
 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
*Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599  
 (9th Cir. 1999).

7 The ALJ is responsible for determining credibility,  
 8 resolving conflicts in medical testimony, and resolving  
 9 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 10 Cir. 1995). The ALJ's determinations of law are reviewed  
*de novo*, although deference is owed to a reasonable  
 construction of the applicable statutes. *McNatt v. Apfel*,  
 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 11 SEQUENTIAL PROCESS

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are  
 15 "under a disability" are eligible to receive benefits. 42  
 16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 17 medically determinable physical or mental impairment"  
 18 which prevents one from engaging "in any substantial  
 19 gainful activity" and is expected to result in death or  
 20 last "for a continuous period of not less than 12 months."  
 21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 22 from "anatomical, physiological, or psychological  
 23 abnormalities which are demonstrable by medically  
 24 acceptable clinical and laboratory diagnostic techniques."  
 25 42 U.S.C. § 423(d)(3). The Act also provides that a  
 26 claimant will be eligible for benefits only if his  
 27 impairments "are of such severity that he is not only  
 28 unable to do his previous work but cannot, considering his  
 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

25 In evaluating whether a claimant suffers from a  
 26 disability, an ALJ must apply a five-step sequential  
 27 inquiry addressing both components of the definition,  
 28 until a question is answered affirmatively or negatively  
 in such a way that an ultimate determination can be made.  
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 claimant bears the burden of proving that [s]he is

1 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
2 1999). This requires the presentation of "complete and  
3 detailed objective medical reports of h[is] condition from  
4 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
5 404.1512(a)-(b), 404.1513(d)).

#### 6 ANALYSIS

##### 7 1. Combination of Impairments

8 Plaintiff first contends the ALJ did not properly consider her  
9 impairments in combination, noting her treating physician opined in  
10 February 2003 that the combined effects of low back pain, left knee  
11 pain, migraine headaches, and menstrual cramps, as well as pain  
12 medication and anti-migraine medication, would cause Plaintiff to  
13 lie down during the day and that she would likely miss an average of  
14 three days of work per month. (Tr. at 30.) Plaintiff also contends  
15 the ALJ failed to consider all of her mental impairments, including  
16 anxiety and depression, as part of her residual capacity even though  
17 those impairments did not meet step two requirements.

18 Defendant contends the ALJ correctly assessed Plaintiff's  
19 ability to perform light work, relying on the objective testing and  
20 findings by Dr. James E. Damon dated April 10, 2003. Dr. Damon  
21 concluded Plaintiff could perform light work with alternate sitting  
22 and standing. (Tr. at 733-35.) Because his opinion was based on  
23 objective tests and independent clinical findings (Tr. at 733-735),  
24 it constitutes substantial evidence. *Andrews v. Shalala*, 53 F.3d  
25 1035, 1041 (9<sup>th</sup> Cir. 1995).

26 The ALJ rejected Dr. Opara's conclusion Plaintiff was disabled  
27 because she found it to be inconsistent with other evidence that  
28 Plaintiff had been normal neurologically, did not have daily  
headaches, and had a history of overuse and/or misuse of pain

1 medication. (Tr. at 30.) The ALJ also noted Dr. Opara opined in  
2 December 2002 that Plaintiff could perform light work. (Tr. at 708-  
3 711.) Additionally, on other occasions, Dr. Opara noted no objective  
4 neurological deficits. (Tr. at 688 (August 2002), 696 (December  
5 2002).)

6 The ALJ also relied on Dr. Pitkethly's findings. After  
7 referral by Dr. Opara for evaluation of her back condition,  
8 neurologist Dr. Pitkethly reported in November 2001 that Plaintiff's  
9 subjective symptoms did not correlate with the MRI or exam.  
10 Plaintiff stood erect, with normal lordotic curve. There was no  
11 paravertebral spasm and no radicular symptoms to lower extremities.  
12 She could tandem walk and walk on heels and toes. She had good  
13 strength in both lower extremities and pedal pulses were okay. Deep  
14 tendon reflexes in upper and lower extremities were bilaterally  
15 equal. Dr. Pitkethly diagnosed herniated disc T12-L1, probably not  
16 symptomatic as the pain complaints were well below that location; he  
17 recommended a comprehensive back exercise program and well-fitted  
18 back brace. (Tr. at 725-726.)

19 Finally, Dr. James Damon in April 2003 examined Plaintiff and  
20 found her in no apparent distress. She exhibited a normal erect  
21 posture, normal gait, could heel and toe walk, perform a half squat,  
22 had normal spinal alignment, and was able to get off and on the  
23 examination table without difficulty. There was no back spasm, 2+  
24 ankle and knee jerks, intact sensation and equal calf and thigh  
25 measurements. Plaintiff put forth poor effort when he tested her  
26 muscle power. There was minimal crepitation in the right knee and  
27 the left knee was totally asymptomatic. (Tr. at 732.) Dr. Damon  
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1 concluded Plaintiff could frequently lift 25 pounds (as demonstrated  
2 by her ability to provide child care for her two toddlers), her grip  
3 was normal; he also noted the probability of some functional overlay  
4 with respect to her reported symptoms. (Tr. at 732-733.) Assessing  
5 Plaintiff's residual capacity, Dr. Damon concluded she could perform  
6 light work, stand or walk for six out of eight hours, did not have  
7 push/pull limitations, and would have occasional postural  
8 limitations. Dr. Damon did not comment or evaluate Plaintiff with  
9 respect to her complaints of chronic migraine headache pain,  
10 evidenced by medical notes made during the relevant time period.

11 The ALJ rejected impairment caused by the migraine headache  
12 history, noting simply the headaches did not occur on a daily basis.  
13 (Tr. at 30.) The medical record indicates Plaintiff reported a  
14 history of headaches since age 12; Dr. Falcon in January 2000  
15 commented Plaintiff was able to control the severity of the  
16 headaches 60% of the time by the application of cold compresses.  
17 (Tr. at 571.) At that time, the use of Imitrex was not possible  
18 because Plaintiff was still nursing her infant. (Tr. at 574.) Dr.  
19 Falcon's recommendation was to withdraw the nursing so Imitrex would  
20 be available.

21 From October 2000 - June 2001, Plaintiff reported regularly to  
22 her treating physician for treatment of headaches secondary to  
23 sinusitis and dental treatment. (Tr. at 604, 606, 616, 618, 619,  
24 625.) Phenergan was prescribed because Plaintiff continued to nurse  
25 her infant. She was treated again for headache in November 2001  
26 associated with sinusitis; Tylenol was provided. (Tr. at 637.)  
27 Because of continuing headache problems, she was referred in  
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1 February 2002 for x-ray of her sinuses, but there was no evidence of  
2 infection. (Tr. at 697.)

3 In June, July, August, September, October, December 2002, and  
4 January 2003, medical notes indicate migraine headaches were  
5 sufficiently severe to require treatment with 10 mg Nubain IM. (Tr.  
6 at 580, 665, 668, 671, 681, 685, 688, 689, 691, 696, 719.) There is  
7 no evidence to contradict this treatment history or a need for it.  
8 The ALJ's rejection of the evidence of migraine headache simply  
9 because they did not occur daily, particularly in light of Dr.  
10 Obara's comment that medication to control the pain would cause  
11 sedation (Tr. at 727), is not sufficient; rather, the ALJ is  
12 required to make findings whether the treatment controlled the  
13 severity and frequency of the headaches so that they would have no  
14 non-exertional impact on her residual capacity. *Connett v.*  
15 *Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003); *Beecher v. Heckler*, 756  
16 F.2d 693, 694 (9th Cir. 1985) (The ALJ is required to consider the  
17 combination of Plaintiff's impairments when assessing her residual  
18 capacity).

19 There is also some inference the ALJ rejected the headaches as  
20 being severe because of overuse or misuse of prescription drugs;  
21 however, a review of the record indicates the object of that abuse  
22 or misuse was Percocet. (Tr. at 629, 631, 633.) There is no  
23 connection in the medical notes that Percocet was used for relief of  
24 migraine pain; rather, it appears to have used for control of back  
25 pain. (Tr. at 633.) The medical notes indicate Phenergan, Imitrex  
26 and Nubain appear to have been the appropriate medications used for  
27 control and relief of Plaintiff's migraine headaches. (Tr. at 580,  
28

1 572.)

2 2. Mental Impairments

3 Plaintiff contends the ALJ should have included her mental  
4 impairments, including depression and anxiety, in the residual  
5 capacity assessment. The record indicates Plaintiff has been  
6 treated with Wellbutrin for depression since the birth of her child  
7 and because of that, she is no longer tearful. (Tr. at 616, 619.)  
8 There is no other evidence of mental health impairment or treatment  
9 except for a passing reference to counseling for depression. (Tr.  
10 at 782.) A residual capacity assessment by Dr. Brown in October  
11 2001, indicated depression nos, with only mild limitations. (Tr. at  
12 588.) Other records indicate Plaintiff was doing well following  
13 post partum depression in March 2001. (Tr. at 600.) Although Dr.  
14 Gillespie noted some anxiety, he followed that with the comment: "I  
15 don't see anything here alarming." (Tr. at 717.) Upon remand, if  
16 warranted, the ALJ shall consider the need for a thorough  
17 psychological evaluation to explore issues of depression, anxiety,  
18 and functional overlay associated with Plaintiff's complaints.  
19 Accordingly,

20 **IT IS ORDERED:**

21 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is  
22 **GRANTED**; the matter is **REMANDED** for additional proceedings pursuant  
23 to sentence four of 42 U.S.C. § 405(g).

24 2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec.**  
25 **21**) is **DENIED**.

26 3. Any application for attorney fees shall be filed by  
27 separate Motion.

1       4.     The District Court Executive is directed to file this  
2 Order and provide a copy to counsel for Plaintiff and Defendant.  
3 The file shall be **CLOSED** and judgment entered for Plaintiff.

4       DATED August 30, 2005.

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7                               s/ CYNTHIA IMBROGNO  
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9                               UNITED STATES MAGISTRATE JUDGE  
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